No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Supreme Court, U.S.
FILED
JUL 26 1984
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SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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CERTIORARI GRANTED JUNE 11, 1984

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a State which contemplates and expressly authorizes intrastate motor common carriers to submit collective rate proposals as a component of a pervasive and actively supervised system of regulation in the public interest must literally compel such collective activity in order to preserve its chosen regulatory system from proscription under Federal antitrust law?

2. Whether the *Noerr-Pennington* doctrine protects the interest of State regulatory commissions in receiving information in the form of rate proposals submitted by a group of regulated motor carriers?

PARTIES

The caption of this Petition contains the name of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the District Court. Neither Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., nor the National Association of Regulatory Utility Commissioners has any parent, subsidiary or affiliated companies.

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OPINIONS BELOW

Each of the opinions below is attached to the Petition for Certiorari:

The opinion of the United States District Court for the Northern District of Georgia, attached as Appendix A, is reported at 467 F.Supp. 471 (N.D. Ga. 1979). The opinion of the Fifth Circuit, Unit "B", attached as Exhibit B, is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). An order granting rehearing *en banc* is attached as Appendix

C. The opinion of the Fifth Circuit, Unit "B", on rehearing, attached as Appendix D, is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983).

JURISDICTION

The judgment of the Fifth Circuit, Unit "B", was entered on April 5, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was granted by order on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B", was entered on April 11, 1983. On April 21, 1983, Petitioners moved the Fifth Circuit, Unit "B", for a stay pending the filing of this petition for writ of certiorari. By order dated May 6, 1983, attached as Appendix E to the Petition for Certiorari, that Court granted the motion and stayed its mandate up to and including May 30, 1983. Certiorari was granted on June 11, 1984. 52 U.S.L.W. 3891 (June 12, 1984). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1) (1966).

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. sec. 1 (Supp. 1981), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The following State statutes and regulations are set forth in Appendix A attached to the brief of Petitioner Southern Motor Carriers Rate Conference, Inc.: section 62-152.1(b), North Carolina General Statutes; section 46-7-18, Official Code of Georgia Annotated; Rule 1-3-1-.14, Georgia Public Service Commission; sections

65-15-106(a) and 65-15-119, Tennessee Code Annotated; section 37-3-7, Code of Alabama; and section 77-7-3, Mississippi Code Annotated.

STATEMENT OF THE CASE

Petitioner National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental non-profit organization founded in 1889. Within its membership are the governmental agencies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. Each of the regulatory commissions in the five States in which this case has arisen, Alabama, Georgia, Mississippi, North Carolina, and Tennessee, is a member of the NARUC. On May 10, 1978, the District Court granted the NARUC's motion to intervene in this litigation as a defendant in order to represent the interests of these five-member commissions. (J.A. 43)

To avoid burdening the Court by the inclusion of repetitive material herein, the NARUC hereby adopts the Statement of the Case contained in the Brief of Petitioner Southern Motor Carriers Rate Conference, Inc. (SMCRC). See SMCRC Br. at 3-9.

SUMMARY OF ARGUMENT

The crucial issue in this case is whether or not the five States involved in this litigation may continue to employ a system of intrastate motor carrier regulation in which their respective regulatory commissions are free to accept both individual and collectively formulated rate proposals from the carriers they regulate. The Court of Appeals and Respondent United States (Government) have concluded that

federal antitrust law denies these States such a regulatory system; rather, in the view of the Court of Appeals and the Government, the States must accept only individual proposals or only collective proposals, but not both.

In response, Petitioner NARUC submits that conscious State legislative and regulatory decisions to employ a regulatory system combining individual and collective rate actions in furtherance of a clearly articulated and affirmatively expressed State policy to replace competition with regulation is protected by the State action exemption announced by this Court in *Parker v. Brown,* 3178 U.S. 341 (1943) (*Parker*). Based upon clear and essential principles of "our Federalism," *Parker* and its progeny serve to protect State economic regulatory programs which are both clearly articulated and affirmatively expressed as State policy and actively supervised by the State. *California Retail Liquor Dealers v. Midcal Aluminum,* 445 U.S. 97,105 (1980) ("the *Midcal* standard"). And further, there can be no doubt in this case that despite the nominal status of the antitrust defendants, it is these State regulatory programs which are under attack by the Government. In a very real sense, the five States and their regulatory commissions are the parties in interest herein.

This attack upon the State interests must ultimately fail, however, for the regulatory program in each of these States satisfies the *Midcal* standard. By its participation in this litigation, each State has described a pervasive system of economic regulation based upon active supervision of the ratemaking activities of regulated intrastate carriers pursuant to a clearly articulated and affirmatively expressed policy to replace unfettered competition with regulation in the public interest. Therefore, the affirmatively expressed decision of each of these States to protect the public in-

terest by relying on a system of individual and collective rate action is protected from Federal interference under the guise of the Sherman Act.

ARGUMENT

I. FUNDAMENTAL PRINCIPLES OF FEDERALISM UPON WHICH THE STATE ACTION DOCTRINE IS GROUNDED PROTECT AFFIRMATIVE STATE DECISIONS TO RECEIVE COLLECTIVE MOTOR CARRIER RATE PROPOSALS AS A COMPONENT OF A PERVASIVE, ACTIVELY SUPERVISED REGULATORY SYSTEM.

A. The State Action Doctrine Embodies Important Principles of Federalism Which Protect State Decisionmaking.

There can be no doubt that the State action exemption from the operation of Federal antitrust laws first announced by the Court in *Parker v. Brown*, 317 U.S. 341 (1943) is based squarely and firmly upon fundamental principles of American federalism:

> In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress.
>
> *Parker*, 317 US. at 351.

In its subsequent State action decisions, the Court has unswervingly affirmed the principle that the reach of the antitrust laws into areas of the economy subject to State regulation is limited by the *Parker* principles of federalism. Indeed, in its most recent term, the Court again recited the now familiar language of *Parker* quoted

supra. Hoover v. Ronwin, 52 U.S.L.W. 4535, 4538 (May 15, 1984). See also *Community Communications v. City of Boulder,* 455 U.S. 40 (1982) ("the *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under Constitution." at 53).[1] The "significant measure of sovereignty" described in *City of Boulder* means that under our constitutional system of government, the States have broad latitude to make choices in the mechanisms adopted to protect their citizens from economic exploitation.[2] *Midcal* teaches that so long as the State has clearly articulated and affirmatively expressed its regulatory choice through an actively supervised system of public regulation, this choice will be respected, and not enjoined by operation of antitrust law.

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[1]In this brief, the NARUC will not repeat the exegesis of the *Parker* line of cases contained in the brief of Petitioner SMCRC. SMCRC Br. at 11. However, the NARUC agrees with the conclusion that State compulsion is not a *sine qua non* for the availability of the State action defense in this case. Rather, the standard to be applied is the two-part formulation announced in *California Liquor Dealers v. Midcal Aluminum,* 445 U.S. 97 1980: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as State policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105. Importantly for purposes of the case at bar, the Court in *Midcal* found that the anticompetitive conduct therein under consideration (which the Court has since characterized as a "*private* price fixing arrangement *authorized* by [the] State", *Hoover v. Ronwin,* 52 U.S.L.W. 4535, 4538 (May 15, 1984) (emphasis added) satisfied the first prong of the test. Clearly, then, the presence of literal compulsion is not necessary to satisfy the first *Midcal* standard, irrespective of the identity of the parties involved.

[2]The problem in *City of Boulder,* of course, was that the State of Colorado had made no choice at all concerning local regulation of cable television. *City of Boulder,* 455 U.S. at 55 ("the State's position is one of mere *neutrality*") (emphasis in original).

B. The States As Real Parties in Interest.

Almost as a matter of definition, the State action issue, based as it is on principles of federalism, invariably arises in a situation in which the machinery of State or local government is enmeshed with the economic behavior of private parties — that is, a system of public regulation established to protect the public interest.[3] Viewed as such, both governmental and private party interests are involved when a federal antitrust attack is leveled at the whole of the regulatory mechanism or one of its parts. Therefore, in a very real sense, it is incorrect to focus on the identity of the parties in analyzing the applicability of the State action doctrine. Except perhaps in the extreme case in which the actions of a private party are completely removed from any colorable State involvement, it is the rare *Parker* type case in which significant State interests are not implicated. Indeed, as Judge Hill noted in his dissent to the *en banc* decision of the Court of Appeals, where a State has affirmatively established a system of regulation displacing unfettered competition, it makes little difference to the efficacy of State regulatory policy whether the antitrust plaintiff sues "governmental entities or private participants" in the regulatory scheme. App. to Pet. for Cert. at 83a-84a.[4]

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[3]E.g. *Parker, supra* (State regulation of agricultural production); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Hoover, supra* (State regulation of the practice of law); *City of Lafayette v. Lousiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison*, 428 U.S. 579 (1976) (State electric utility regulation); *New Motor Vehicle Board v. Orrin W. Fox*, 439 U.S. 96 (1978); *Boulder, supra* (municipal regulation of cable television franchises); and *Midcal, supra*, (State regulation of wine marketing).

[4]Citing Justice Stewart's dissent in *Cantor, supra*, 428 U.S. at 616-17, n. 4

So it is here. The interests of the five States involved in this litigation are implicated as surely and directly as if the Government had hailed their respective public service commissions into Federal court to defend their regulatory systems against injunction under the Sherman Act.[5] This strong State interest is apparent because the policies of these States are by no means "neutral" concerning the issue of intrastate collective rate action. Rather, there can be little doubt that each State whose regulatory procedures are under attack has made a conscious and informed decision to accept individual *and* collective rate proposals as a necessary element of its pervasive system of intrastate motor carrier regulation.[6]

A brief analysis of the North Carolina system of regulation makes apparent the strong State interest in this case, as well as the affirmative expression of State policy to include collective rate action in its regulatory scheme.[7] As distilled in the *amicus* brief of the State of North Carolina filed in the case, the policy of the State in the area of motor carrier regulation is to "establish motor carrier rates for the shipping public that are just and reasonable and

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[5]The District Court recognized the importance of this case to the respective States when it granted the NARUC's motion to intervene as a defendant in this case over the repeated objections of the Government. (J.A. 43) "Whether these five commissions will be able to continue in their present ratemaking routines is an essential question posed in this litigation." (J.A. 46)

[6]See SMCRC Br. at 24-30. for a State by State description of the regulatory policies and procedures of the five States concerning collective rate action. We adopt the conclusion that each State program satisfies the *Midcal* standard.

[7]By focusing its attention on North Carolina, the NARUC joins the District Court, which found that "[p]rocedures within each commission for review of published rates tend to be uniform." App. to Pet. for Cert. 9a.

nonpreferential and nondiscriminatory."[8] To fulfill this policy, it is the State itself, acting through the North Carolina Utilities Commission (NCUC) which fixes and establishes rates for motor carrier transportation services.[9] Based upon years of experience with its regulatory program, North Carolina has concluded that in order to efficiently regulate the 600 individual carriers operating within its borders, collective rate action as authorized by State legislation is an essential part of its regulatory system: ". . . the NCUC regards the collective activity of the rate bureaus as necessary to the efficient regulation of intrastate carrier rates."[10] Clearly, then, North Carolina quite ably demonstrates a regulatory policy committed to the use of collective rate proposals as an element of a comprehensive program displacing market competition with public regulation.[11]

There can be little doubt, then, that North Carolina's interest in the issue raised in this litigation (whether the State must compel collective rate proposals) is strong. The State's *amicus* brief is in large measure a plea for the regulatory flexibility which would be lost if the Government's theory of the State action doctrine prevails.[12]

[8]North Carolina Am. Br. at 5.

[9]*Id.*

[10]*Id.* at 11.

[11]See also Affidavit of J.C. Turner, (J.A. 50, 54) (". . . collective rate-proposing in North Carolina greatly assists the Public Staff in fulfilling its duty and responsibility to adequately protect the using and consuming public. . ."); and Affidavit of I.H. Hinton, (J.A. 55).

[12]The "compulsion test" advocated by the Government and upheld by the Court of Appeals would, of course, bind the five States in a regulatory straitjacket which would serve to stifle rather than promote, competition. App. to Pet. for Cert. at 79a. Therefore, by destroying the flexibility that North Carolina and its sister States have determined is necessary to effective public regulation, the Government's position destroys both competition and the sovereign ability to make regulatory policy.

North Carolina Am. Br. at 12. North Carolina's decision to accept both individual and collective rate proposals serves regulatory purposes which are important to the integrity and efficiency of the State's regulatory process. We submit that it is not the purpose of Federal antitrust law to prohibit such State decisionmaking; rather, the State action doctrine preserves North Carolina's sovereign ability to choose the system of regulation it determines will protect the public interest. Here, North Carolina has made its policy choice clear and its interest in preserving this decision must prevail.

In the final analysis, the NARUC submits that Federal antitrust laws are an illsuited instrument for the reformation of State regulatory policies, particularly where, as here, Federal power is employed to strike at the heart of a State's chosen regulatory policy. If and when a State determines that collective rate action is not in the public interest, ample legislative and regulatory mechanisms exist in State government to modify or even abolish this policy. Until such new decisions are made, however, existing State policies should be respected and not enjoined under the Sherman Act.

II. NOERR-PENNINGTON

Petitioner NARUC adopts the argument presented in the brief of SMCRC on this issue., SMCRC Br. at 38-42.

CONCLUSION

As the District Court found,

> Whether these five [State] commissions will be able to continue in their present rate-making routines is an essential question posed in this

> litigation. A negative answer to this question will necessarily impede or impair the commissions' interest in continued use of the present rate conferences. (J.A. 46)

It is the position of the NARUC that the very basis of the State action doctrine – the need to protect clearly articulated and affirmatively expressed State policies from antitrust interference – requires that this question be answered in the affirmative, particularly where, as here, the antitrust attack strikes at the core of the State's system of regulation. Therefore, the NARUC respectfully requests that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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